

IN THE HIGH COURT OF BOMBAY AT PANAJI

CRIMINAL APPEAL NO. 22 OF 2005

Shri William Rosario Fernandes,
Major in age, resident of
House No.133/1, 2nd ward,
Colva, Salcete, Goa.

..... Appellant/
Original Complainant

V e r s u s

1. M/s. Cabral & Co.,
Tilak Commercial Complex,
1st Floor, F. L. Gomes road,
Vasco da Gama, Goa 403 902.

2. Shri Francise Simon Cabral,
Proprietor, aged about years,
C/o. Cabral & Co.,
Tilak Commercial Complex,
1st Floor, F. L. Gomes road,
Vasco da Gama.
(Registered addresses)

..... Respondents/
Original Accused

Mr. S. Usgaonkar, Advocate for Appellant.

Mr. P. A. Kholkar, Advocate for the Respondents.

CORAM: N. A. BRITTO, J.

DATE: 15th September, 2006.

ORAL JUDGMENT

This is complainant's appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, ('Act' for short), by Order dated 31.03.2005 of the learned Chief Judicial Magistrate, Margao.

2. The undisputed facts are as follows:-

There were two agreements between the Complainant and the Accused who is the proprietor of a concern known as M/s. Cabral and Company. The first agreement was dated 30.12.1999 and was styled as an Agreement of Sale. This agreement was entered into between M/s. William's Beach Retreat Private Ltd., of which the Complainant is the Managing Director on one hand, and the accused and his wife on the other hand. By the said agreement, the accused and his wife agreed to purchase a hotel complex known as William Resorts for a sum of Rs.3,30,00,000/-, out of which Rs. 25,00,000/- were paid and the balance of Rs.57,67,873/- was payable and was to be paid as indicated in Para 4 of the agreement by the end of January, 2001. Another agreement dated 01.10.2001, came to be executed between the Complainant and the Accused and this agreement was styled as Agreement of Settlement of Accounts. As per this agreement, seven cheques were issued with different dates mentioned on the said cheques to the Complainant and there is no dispute that the first five cheques were honoured by

the Accused. The dispute arose as regards the sixth cheque bearing no. 156749 dated 15.02.2002 and the seventh cheque bearing no. 082601 dated 15.03.2002. The dishonour of the said two cheques became the bone of contention between the parties. The dishonour of cheque no. 156749 dated 15.02.2002 became the subject matter of the C.C. no. 256/OA/NI/2002/I. The said case ended in conviction by Judgment dated 23.11.2004. The appeal filed came to be dismissed by the Court of Sessions on 07.06.2005. A revision filed against the same came to be dismissed by this Court by Judgment dated 07.06.2006.

3. The cheque no. 082601 dated 15.03.2002 became the subject matter of C.C. no. 431/OA/NI/2002/F, which ended in acquittal by the impugned Judgment from which the present appeal arises.

4. Both the parties did not ensure that both the complaints were tried and disposed of by one and the same Court. Note is required to be taken of the fact that the Complainant has prosecuted only one accused namely A2, the proprietor of M/s. Cabral & Company. The said Cabral & Company, a proprietorship concern of accused no.2, had no independent legal entity to be prosecuted separately. This position ought to have been taken note of by the learned CJM.

5. There is no dispute that the subject cheque was presented by the Complainant for encashment through Federal Bank, Margao, and was returned dishonoured by Memorandum dated 16.03.2002 with a remark “funds insufficient”. There is also no dispute that the Complainant addressed the statutory notice by registered post A.D. dated 28.03.2002, which was received by the accused on 02.04.2002 and the period for the compliance of the said notice expired on 17.04.2002. There is also no dispute that after the filing of the complaint by the Complainant on 01.07.2002, the accused on 18.06.2003, deposited a sum of Rs.2,50,000/- by demand draft in the name of the Complainant without prejudice to his rights which the Complainant accepted, without prejudice to the rights of the Complainant.

6. The dispute started after the Complainant gave a letter to the accused dated 15.04.2002, addressed to him.

7. Before going into the said controversy, it is necessary first to decide the application filed on behalf of the Complainant under Section 391 of the Code (Code of Criminal Procedure, 1973) to produce a letter dated 30.04.2002 addressed on behalf of the Complainant to the Advocate of the accused. Objecting to the said production, Shri Kholkar, the learned Counsel on behalf of the accused has submitted that the Complainant did not produce the said letter dated

30.04.2002 at the trial when he could have produced the same. However, Shri Kholkar has no objection in case the said letter is looked into by the Court. On the other hand, it is submitted by learned. Counsel Shri Usgaonkar that the said letter dated 30.04.2002 was produced by the accused himself in the trial of the other case namely C.C. no. 256/OA/Ni/2002/I and, therefore, there is no question of any prejudice being caused to the accused. Considering the submissions made on behalf of both the parties, and particularly the submission that the said letter was produced by the Accused in the other case the Complainant is allowed to produce the said letter dated 30.04.2002.

8. The complainant examined himself in support of his case and produced the necessary documents including the legal notice and the postal acknowledgments. In the course of cross examination, the correspondence exchanged between the complainant and the accused, after the said letter dated 15.04.2002, was produced on behalf of the accused. The Complainant was questioned on the said letter dated 15.04.2002 and it was put to the Complainant that the Complainant had given the said letter to the accused authorizing him to deduct a sum of Rs.1,21,351/- from the balance of Rs.5,00,000/- due to the accused under the agreement dated 01.10.2001 and the Complainant stated that the accused had come to his office at Vasco da Gama on that day and the accused had kept ready the said letter and as the accused said that they would give him Rs.

2,50,000/-, he signed the said letter as he was badly in need of money even though the accused had not paid the said sum of Rs.2,50,000/-.

9. After the said letter dated 15.04.2002 was given by the Complainant to the accused, on behalf of the accused, a letter dated 19.04.2002 was written to the Complainant. In this letter, on behalf of the accused, reference was made to the statutory notice sent by the Complainant to the Accused. In this letter, it was stated that the Complainant had requested the accused to make the payments and deduct the amount from the amount payable to the Complainant under the settlement and as per the Complainant's request, the accused had cleared the said payments and discharged the Complainant's liability. It was also stated that by virtue of the said letter dated 15.04.2002, the Complainant had authorized the accused to make the deduction in the sum of Rs.1,21,351/-. It was also stated that the gross amount payable to the Complainant was Rs.3,78,649/-. However, it is to be noted that the accused did not send the said amount to the Complainant but stated that the accused was prepared to make the said payment subject to certain conditions including a condition that the Complainant returns the dishonoured cheques and the Complainant gives no objection letter to the accused for obtaining extension of OTS from EDC ...etc. The said letter was replied to by the Complainant by letter dated 30.04.2002. On behalf of the Complainant, it was made clear to the accused that as per settlement by virtue of agreement dated

01.10.2001, there was no scope for the accused to seek deductions on the claims of payment either by way of sales tax or luxury taxes or money due to the employees which were all dues payable by the said Company M/s. William Beach Retreat Private Limited. On behalf of the Complainant it was also stated that the Complainant had not made any request to the accused and, therefore, there was no question to request the accused to make any payment or deduct any payment made against the dues to the accused. The Complainant explained in Paras 12(a) to (g) under what circumstances the said letter dated 15.04.2002 came to be issued by the Complainant and the Complainant also withdrew the said letter dated 15.04.2002 and further called upon the accused to pay the amount within two days from the date of the receipt of the reply by the accused. The Complainant also threatened to terminate the agreement in case his demand was not met in relation to the Management of the said M/s. William Beach Retreat Private Limited. The accused, in his turn, by letter dated 04.05.2002, sent Rs.5,00,000/- by demand draft, making it clear that it was by way of full and final settlement under agreement dated 01.10.2001. The accused also requested the Complainant to send to the accused duly signed receipt for the said sum of Rs.5,00,000/- and also a letter acknowledging that all amounts payable by the accused to the Complainant under the said two agreements were fully paid. The accused also requested the Complainant to return the two dishonoured cheques. It may be noted that this letter dated 04.06.2002, was not received by the Complainant within two days as

stipulated and was in fact received on 07.05.2002 and, therefore, the Complainant by letter dated 11.05.2002, returned the said demand draft further alleging that the Complainant had suffered losses on various counts in the sum of Rs.15,00,000/-.

10. The learned CJM referring to the letter of the Complainant dated 15.04.2002 (Exhibit 38/C), observed that the said letter showed the conduct of the Complainant and the accused after issuing legal notice and therefore was relevant. The learned CJM also held that the said letter dated 15.04.2002 amounted to renovation or alteration of the Contract by which the Complainant had admitted that he owed an amount of Rs.1,21,351/- to the Complainant and therefore the parties had altered their contractual situations, and therefore, proceeded to acquit the accused as aforesaid.

11. The first submission of Shri Kholkar, the learned Counsel on behalf of the accused is that the view held by the learned Chief Judicial Magistrate, is a possible view and this Court sitting in appeal against the same, need not disturb the said finding. On the other hand, Shri Usgaonkar, the learned Counsel on behalf of the Complainant has submitted that the learned CJM totally ignored the letter dated 04.05.2002, by which, the accused had offered to pay the entire amount due in both the cases and in case the accused was liable to pay Rs.3,78,649/- as contended by him in the earlier letter sent on behalf of the accused dated

19.04.2002, then the accused would not have sent the said amount or would not have paid the entire amount subsequently. Shri Usgaonkar has submitted that nothing prevented the accused in case he really felt that only Rs.3,78,649/- was required to be paid by the accused in view of the Complainant's letter dated 14.04.2002, then the accused would have proved its bonafides by sending along with letter dated 19.04.2002, the said amount of Rs.3,78,649/-. Learned Advocate further submits that since no amount was paid by the accused either in terms of the statutory notice or as contended by the accused himself, the offence was completed on 17.04.2002.

12. Admittedly, the statutory notice was received by the accused on 02.04.2002 and the accused was required to comply with the same on or about 17.04.2002, which admittedly, the accused did not comply either by sending the sum of Rs.2,50,000/- as claimed by the Complainant or for that matter, as contended by the accused by sending Rs.3,78,649/-. The letter dated 15.04.2002 was withdrawn by the Complainant by his letter dated 30.04.2002 and i.e. even before the accused could have acted on the said letter. The said letter dated 15.04.2002 had merely authorized the accused to make the payments as stipulated therein and deduct the amount due towards the hotel account. It was certainly not the case of the accused that at any time, he had made the said payments and acted on the said letter. The said letter did not at all refer to the subject cheque/s issued

earlier or the agreements executed earlier and, therefore, it could not have been taken by any stretch of imagination that it was issued by way of modification or alteration of the earlier agreement/s. The suggestions put to the Complainant that the Complainant had authorised the Accused to deduct the sum of Rs.1,21,351/- from the balance amount of Rs.5 lacs due on subject cheque/s was not translated by the accused into evidence by stepping into the witness box. Since the accused had not proved that he acted upon the said letter and paid the amount as per the said letter and the same was withdrawn even before it was acted upon, the same could not be taken by way of alteration or modification of the agreement/s earlier entered into between both the parties. The view taken by the learned CJM, will also be incorrect in view of the said letter dated 30.04.2002.

13. The learned Chief Judicial Magistrate entirely lost sight of the fact that the Complainant had explained under what circumstances the said letter dated 15.4.2002 came to be issued by him when he was called to the respondents' office. All that the accused had stated as regards the same in his statement under Section 313 of the Code, was that he had pointed out to the Complainant that the amount was not due since the deductions were to be made as per his request. Firstly, it must be noticed that the said letter does not contemplate of making any deductions from the amount as regards to the said cheques and all it does is that it authorizes the accused to make the payments mentioned therein and deduct the amount due by

the accused from his hotel account. If, as per the accused the said letter dated 15.04.2002 was interpreted by the accused as authorizing him to deduct the said sum of Rs.1,21,351/- from the amount of the two cheques of Rs.5,00,000/-, it was for the accused to have given evidence in that regard. The learned CJM entirely lost sight of the fact that the accused had not paid the amount of the first cheque i.e. Rs.2,50,000/- or balance amount of the second cheque after deducting Rs.1,21,351/- before the expiry of the period of the second notice on 17.04.2002. The learned CJM also ignored the presumptions which were available to the Complainant. In this context, reference could be made to the case of ***K. N. Beena v. Muniyappan & anr. ((2001) 8 S.C.C. 458)***, wherein the Hon'ble Supreme Court has stated that “the High Court appears to have proceeded on the basis that the denials/averments in his reply dated 21.05.1993, were sufficient to shift the burden of proof on the Complainant to prove that the cheque was issued for a debt or liability and that was entirely erroneous approach”. The Court held that that the accused was required to prove in the trial by leading cogent evidence that there was no debt or liability and the accused having not led any evidence, could not have been said to have discharged the burden cast on him and the accused having not discharged the burden of proof that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. In the case at hand, the accused had given his explanation as to under what circumstances the said letter dated 15.04.2002 came to be issued, apart from the fact that the said

letter was withdrawn by the Complainant subsequently by letter dated 30.04.2002. There was nothing improbable in the explanation furnished by the Complainant as regards to the circumstances in which the said letter came to be issued and in the absence of any evidence given to the contrary by the accused. The notice sent by the Complainant had remained without being complied till 17.04.2002 and prior to that date, the accused did not think fit to make part payment if according to the accused, the accused was entitled to deduct any amount from the cheque/s, which the accused had given pursuant to the said second agreement. The learned CJM in the absence of any evidence having been given by the accused, ought to have accepted the evidence of the Complainant including the explanation given by the Complainant as regards the said letter dated 15.04.2002, which in the absence of any evidence led by the accused, did not at all appear to be improbable.

14. The second point raised by Shri Kholkar is with reference to the Judgment of the Apex Court in ***Suman Sethi v. Ajay K. Churiwal & Anr. ((2000) 2 S.C.C. 380)***. Shri Kholkar has submitted that the complaint in this case was filed on 13.05.2002 but the accused had tendered Rs.5,00,000/- vide his letter dated 04.05.2002 by demand draft and the accused having tendered the said amount of Rs. 5,00,000/- prior to the filing of the complaint, no offence was committed by the accused. On the other hand, Shri Usgaonkar, the learned Counsel on behalf of the Complainant has submitted that the expression “*before the complaint is filed*”

appearing in the Judgment of the Hon'ble Supreme Court in the case of ***Suman Sethi*** (supra), cannot be considered to be the ratio of the said Judgment and the said expression is nothing but a casual observation of the Apex Court unrelated to the points decided in the said case. Learned Advocate Shri Usgaonkar further submits that even if the said observation is accepted as the ratio, the case at hand is distinguishable from the case of ***Suman Sethi*** (supra), because in the case of ***Suman Sethi*** (supra), payment was made while in the case at hand, payment was only tendered but not accepted by the Complainant as it was not strictly as per the Complainant's letter dated 30.04.2002. Learned Advocate Shri Usgaonkar has further submitted that even if the said observation is considered to be the ratio, then the same has not been followed by the Supreme Court in a later decision in the case of ***Rajneesh Aggarwal v. Amit J. Bhalla (AIR 2001 SC 518)***. Shri Usgaonkar has referred to various Judgments of the Hon'ble Supreme Court and submitted that casual observations here and there cannot be considered as the ratio of a decision. Shri Kholkar has again submitted that the case of ***Suman Sethi v. Ajay K. Churiwal & anr.*** (supra), was followed in ***K.R. Indira v. Dr. G. Adinarayana (2003) 8 SCC 300***, in Paras 8 and 9 of the Judgment. In fact, Shri Usgaonkar had relied upon Para 10 of this very Judgment in the case of ***K.R. Indira v. Dr. G. Adinarayana*** (supra), to explain as to when an offence under Section 138 of the Act is completed.

15. What are the ingredients to be complied with for completion of an offence under Section 138 of the Act, have been elaborately set out by the Supreme Court in various decisions including the case of *M/s. Kusum Ingots & Alloys Ltd. v. M/s. Pennar Peterson Securities Ltd. & Ors. (AIR 2000 S.C. 954)*, and the same have been reiterated in Para 10 of the Judgment of *K.R. Indira v. Dr. G. Adinarayana* (supra) and they are as follows:-

- (1) Drawing of the cheque by a person on an account maintained by him with a banker, for payment to another person from out of that account for discharge in whole/in part of any debt or liability;
- (2) Presentation of the cheque by the payee or the holder in due course to the bank;
- (3) Returning the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque.
- (4) Giving notice in writing to the drawer of the cheque within 15 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount; and
- (5) Failure of the drawer to make payment to the payee or the holder in due course of the cheque, of the amount covered by the cheque within 15 days of the receipt of the notice.

16. Needless to observe, all the above requirements or ingredients can be culled out from Section 138 of the Act itself. The last ingredient namely (5) above i.e. is the failure of the accused to make payment within 15 days after service of notice. If payment is made within the said period of notice, then no offence gets committed but in case of failure, the offence is completed. Even if the payment is made on the 16th day the same is not sufficient to come out of the rigours of Section 138 of the Act. In Criminal law, commission of offence is one thing and prosecution for it is quite another. Commission of an offence of dishonour of cheque is governed by Section 138 of the Act. Prosecution is governed by Section 142 of the Act and one has nothing to do with the other. The offence under Section 138 of the Act is completed in all respects upon the failure by the accused to comply with the notice of demand. In the case of ***Rajneesh Aggarwal v. Amit J. Bhalla***, (supra), the Hon'ble Supreme Court stated that so far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereof, will not absolve the accused of the liability of the criminal offence, though in the matter of awarding of sentence, it may have some effect on the Court trying the offence. The Supreme Court also stated that the object of issuing notice indicating the factum of dishonour of cheques, is to give an opportunity to the drawer to make payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the

Bank dishonoured the cheques. The Supreme Court also observed that having regards to the object of issuance of a notice, the notices issued cannot be construed in a narrow technical way without examining the substance of the matter. The Hon'ble Supreme Court in the case of ***Rajneesh Agarwal*** (supra), was considering, inter alia, whether the deposit of the entire amount covered by three cheques while the matter was pending in Court, would make any difference and answered the said question by stating that so far the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereto, will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some affect on the Court trying the offence by the same analogy. If payment is made after the offence is committed but before a criminal complaint is filed, it can have the same effect namely, it cannot absolve the accused of criminal liability but it can at the most be taken into consideration while awarding the sentence. The Apex Court in the case of ***Suman Sethi v. Ajay K. Churiwal & anr.*** (supra), was dealing with the question as to whether the notice issued under proviso (b) to Section 138 of the Act, was valid or not, and in that context, the Supreme Court observed in Paras 9 and 10 as follows:-

“9 – This Court had occasion to deal with Section 138 of the Act in *Central Bank of India v. Saxons Farms* and held that the object of the notice is to give a chance to the drawer of the cheque to rectify his

omission. Though in the notice demand for compensation, interest, cost, etc. is also made, the drawer will be absolved from his liability under Section 138 if he makes the payment of the amount covered by the cheque of which he was aware within 15 days from the date of receipt of the notice or before the complaint is filed.

10 – In Section 138 the legislature clearly stated that for the dishonoured cheque the drawer shall be liable for conviction if the demand is not met within 15 days of the receipt of notice but this is without prejudice to any other provision of the Act. If the cheque amount is paid within the above period or before the complaint is filed the legal liability under Section 138 will cease and for recovery of other demands as compensation, costs, interest, etc., a civil proceeding will lie. Therefore, if in a notice any other sum is indicated in addition to the 'said amount' the notice cannot be faulted, as stated above.”

17. It has been emphasised on behalf of the accused by learned Advocate Shri Kholkar that the expression “*before the complaint is filed*”, cannot be considered to be a casual observation since it is found twice in Paras 9 and 10 of the Judgment in the case of ***Suman Sethi v. Ajay K. Churiwal & anr.*** (supra) and also followed in ***K.R. Indira v. Dr. G. Adinarayana*** (supra). However, both the learned Counsel concede that the said expression “*before the complaint is filed*”,

does not appear in the case of *Central Bank of India v. Saxons Farms & Ors.* ((1999) 8 S.C.C. 221). Shri Usgaonkar further submits that the said expression “before the complaint is filed”, has causally appeared in the case of *K.R. Indira v. Dr. G. Adinarayana* (supra), in Paras 8 and 9 of the learned Judgment.

18. The Apex Court in *Rajpur Ruda Meha & Ors. v. State of Gujarat* (AIR 1980 S.C. 1707), has held that since Section 384 of the Cr.P.C. was neither raised nor argued, a discussion by the court after “pondering over the issue in depth” would not be a precedent binding on the Courts. In the case of *M/s. Goodyear India Ltd., v. State of Haryana & anr.* (AIR 1990 S.C. 781), the Supreme Court has stated that it is well settled that a precedent is an authority only for what it actually decides and not for what may remotely or even logically follows from it. The Supreme Court has further held that a decision on a question which has not been argued, cannot be treated as a precedent. In the case of Divisional Controller, *KSRTC v. Mahadeva Shetty & anr.* ((2003) 7 S.C.C. 197), the Supreme Court has observed that the scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge, is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it

cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents sub silentio and without argument are of no moment. Mere causal expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority. In *State of Orissa & Ors v. MD. Illiyas ((2006) 1 S.C.C. 275)*, the Supreme Court has stated that a decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving Judgment that construes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates; (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) Judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein, nor what logically flows from the various observations made in the Judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. A case is a precedent and binding for what it explicitly decides and no more. The words used by the Judges in their

Judgments are not to be read as if they are words in an Act of Parliament Referring to the case of *Quinn v. Leathem (1901 AC 495)*, the Supreme Court observed that every Judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

19. In my humble view, no drawer of a cheque can be absolved of his liability under Section 138 of the Act if he makes the payment after the notice and before the filing of the complaint and this, I say on the basis that the offence gets completed on the failure of the drawer of the cheque to comply with the notice of the demand as contemplated by proviso (b) to Section 138 of the Act. Any subsequent payment by the drawer of the cheque after failure to comply with the notice either before or after filing the complaint, could be taken only towards the mitigation of the sentence to be imposed upon the drawer of the cheque i.e. the accused in a given case. This conclusion can be safely arrived by taking note of the observations of the Supreme Court in the three cases referred to hereinabove, namely *M/s. Kusum Ingots & Alloys Ltd. v. M/s. Pennar Peterson Securities Ltd. & Ors.*, (supra), Para 10 of *K.R. Indira v. Dr. G. Adinarayana* (supra) as well as *Rajneesh Aggarwal v. Amit J. Bhalla*, (supra). The said observations of the

Supreme Court in the case of *Suman Sethi v. Ajay K. Churiwal & anr.* (supra), reproduced in *K.R. Indira v. Dr. G. Adinarayana* (supra), has therefore, got to be considered as mere casual observations not having the force of ratio or dictum as laid down by the Supreme Court. The contention made on behalf of the accused therefore has got to be rejected. That apart, in the case at hand, the payment tendered on behalf of the accused vide letter dated 04.05.2002 was not accepted by the Complainant as it did not comply with the stipulations of the Complainant's letter dated 30.04.2002 and therefore it could not be said that the accused had made payment in this case, as otherwise sought to be contended on behalf of the accused. The payment was made only after filing of the complaint and which was accepted by the Complainant without prejudice to his rights.

20. Lastly, Shri Kholkar submits that the amount of the subject cheque was not due because the accused was entitled to deduct the sum of Rs.1,21,351/-, and therefore, the amount of the cheque given exceeded the amount payable to the Complainant and therefore the accused was not bound to honour the said cheque. Reliance has been placed by Shri Kholkar on the case of *Angu P. Textiles (Private) Ltd. & Ors. v. S. R. Company (I)*(2002 B.C. 99), wherein the Madras High Court has held that if the cheque is for an amount higher, then Section 138 of the Act is not attracted. The above submission of the learned Counsel cannot be accepted. No doubt that the Complainant did give the said letter to the accused

dated 15.04.2002. The Complainant has explained under what circumstances the said letter came to be given to the accused. The Complainant subsequently withdrew the said letter by letter dated 30.04.2002. If the accused had rightly understood the said letter as authorizing him to deduct a sum of Rs.1,21,351/-, nothing prevented the accused from paying Rs.1,28,649/- by way of compliance to the statutory notice sent to the accused or pay the said sum of Rs.3,78,649/-, in case the said amount was to be deducted from both the said cheques. The accused neither paid the amount due on the first cheque nor the balance amount of the suit cheque after deducting Rs.1,21,351/-. The accused also did not send the balance amount as per letter dated 19.04.2002 but instead imposed further conditions against the Complainant. The said letter dated 15.04.2002 was in fact withdrawn by the Complainant even before it was acted upon by the accused. In my view and in the light of explanation given by the Complainant and in the absence of any evidence having been led by the accused, the said letter by no stretch of imagination could have been considered as an authority to the accused to deduct any amount of the cheque/s and pay the balance. The accused having not paid either the whole amount of the cheque or part of the amount which the accused was liable to pay according to him, before the period of the notice, the offence in this case was completed. The ratio of the decision cited is inapplicable to the facts of the case at hand. In that case, part payment of the cheque was received from the accused by the Complainant prior to the presentation of the cheque to the Bank,

which fact was admitted by the Complainant.

21. As a result of the above discussion, the appeal deserves to succeed and the Judgment dated 31.03.2005 deserves to be set aside. Consequently, the accused is hereby convicted under Section 138 of the Act. Since the accused has paid the amount of the cheque subsequently before the Court and since in the other case a fine of Rs.5,000/- was imposed upon the accused, in my view, the adequate sentence to be imposed in this case will be the same i.e. fine of Rs.5,000/- under Section 138 of the Act, which the accused is hereby directed to deposit in this Court within a period of three weeks. In case of default, the accused shall undergo S.I. for fifteen days. In case the fine is deposited, the entire amount shall be paid to the Complainant.

N. A. BRITTO, J.

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